BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In the Matter of | ) | |
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| Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of Ninth Circuit's *Marks v. Crunch San Diego, LLC* Decision | ) | CG Docket No. 18-152 |
| | ) | |
| Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 | ) | CG Docket No. 02-278 |

# COMMENTS OF THE EDISON ELECTRIC INSTITUTE

**Edison Electric Institute**

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**REPLY COMMENTS OF THE**
**EDISON ELECTRIC INSTITUTE**

## I. Background and Summary

The Edison Electric Institute ("EEI"), on behalf of its member companies, respectfully submits these Reply Comments in response to the Public Notice issued on October 3, 2018, by the Federal Communications Commission ("FCC" or Commission") Consumer and Governmental Affairs Bureau ("Bureau").[1] The Public Notice seeks comment on a recent Ninth Circuit of Appeals panel decision in *Marks v. Crunch San Diego, LLC*,[2] interpreting the definition of an automatic telephone dialing system ("ATDS") under the Telephone Consumer Protection Act of 1991 ("TCPA" or "Act").[3]

Since the D.C. Circuit's *ACA International v. Federal Communications Commission*

[1] Consumer and Governmental Affairs Bureau Seeks Further Comment on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Marks v. Crunch San Diego, LLC Decision, Public Notice, CG Docket Nos. 19-152 and 02-278, DA 18-1014 (rel. October 3, 2018) ("Public Notice").

[2] *Marks vs. Crunch San Diego, LLC*, No 14-56834, 2018 WL 4495533 (9th Cir. Sept. 20, 2018) ("*Marks*").

[3] 47 U.S.C. § 227(a)(1).

decision which correctly set aside the Commission's interpretation of ATDS,[4] courts have decided questions related to what type of equipment comes under the definition of an "autodialer" under the TCPA. The Second and Third Circuits have adopted a narrower definition of an "autodialer," whereas the Ninth Circuit has expanded that definition.[5]

First, in *Dominguez*, the Third Circuit held, in view of the D.C. Circuit's decision in *ACA International*, it must interpret "autodialer" as it did prior to the 2015 Declaratory Ruling and Order and thus rejected the plaintiff's argument that "capacity" under Section 227(a)(1) of the TCPA includes the potential capacity to function as an "autodialer." The Third Circuit concluded that an "autodialer" must have the present capacity to generate random or sequential telephone numbers and dial those numbers. EEI agrees with this decision because if the equipment cannot perform the functions prescribed in the statute cannot meet the definition.

Second, in *King*, the Second Circuit also noted the D.C. Circuit's *ACA International* decision in reviewing whether the term "capacity" covers devices that would have the ability to dial random and sequential numbers only after modifications, such as software changes. The Second Circuit held that the term "capacity" under Section 227(a)(1) means that equipment must have the present capacity to dial numbers randomly and sequentially. EEI agrees with this interpretation because otherwise electric companies would face the risk of TCPA liability when placing calls (e.g., customer satisfaction survey and other service-related calls) manually using equipment that does not have an autodialing feature (or for which such feature is not enabled), solely because the equipment

[4] *See ACA International, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) ("*ACA International*") (affirming in part and vacating in part Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (the "2015 Declaratory Ruling and Order")).

[5] *See King v. Time Warner Cable, Inc.*, No. 15-2474 (2d Cir. June 23, 2018) ("*King*"); *Dominguez v. Yahoo Inc.*, No. 17-1243 (3d Cir. June 26, 2018) ("*Dominguez*").

could be modified and used for autodialing.

Contrary to *Dominguez* and *King*, however, the Ninth Circuit concluded in *Marks* that the TCPA is ambiguous on its face, holding that an "autodialer" must be interpreted to include equipment that can automatically dial phone numbers stored on a list, regardless of whether human intervention is required.[6] The Ninth Circuit's broad interpretation of "autodialer" is very problematic, because such an expansive definition would include every device that can dial numbers automatically from a stored list, which would encompass any smartphone with such programming.

Given the differing interpretations among the courts on the definition of ATDS under the TCPA, there exists uncertainty and risk attendant to the issue of what is an autodialer, and therefore whether lawful and legitimate communications between electric utilities and customers could result in TCPA liability. Electric companies contacting customers must know whether their equipment is an ATDS before the call is made. EEI appreciates that the Commission issued the Public Notice in view of the uncertainty in the circuits and urges the Commission to act to establish uniformity and reduce confusion around the definition of an autodialer by disregarding or rejecting the *Marks* decision.[7] The Commission should provide industry with certainty by interpreting ATDS consistent with *ACA International* and with the definition of an ATDS espoused by the U.S. Chamber Institute for Legal Reform ("Chamber"), EEI and others in the *Petition for Declaratory Ruling* filed on May 3, 2018.[8] EEI also agrees with the Chamber that the Commission should: (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers

[6] *Marks*, 2018 WL 449555, at *8.

[7] *See, e.g.*, Comments of Investor's Business Daily, Inc., suggesting that the expansive definition of ATDS in *Marks* will only further increase the litigation burden on American businesses.

[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Petition for Declaratory Ruling, CG Docket No. 02-278 (May 3, 2018) ("*Petition for Declaratory Ruling*").

and dial those numbers without human intervention; (2) clarify that if human intervention is required in generating a list of numbers to call or in making a call, then equipment in use is not automatic and therefore is not an ATDS; and (3) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.[9]

## II. Introduction

EEI is the trade association that represents all U.S. investor-owned electric companies. Its members provide electricity for 220 million Americans and operate in all 50 states and the District of Columbia. The electric power industry supports over seven million jobs in communities across the United States. In addition to its U.S. members, EEI has more than 60 international electric companies, with operations in more than 90 countries, as International Members and hundreds of industry suppliers and related organizations as Associate Members. EEI's members are major users of telecommunications systems to support the goals of clean power, grid modernization and providing customer solutions.

On behalf of the owners and operators of a significant portion of the U.S. electricity grid, EEI has filed comments before the Commission in various proceedings affecting the telecommunications' rights and obligations of its members that are impacted by the FCC's rules and policies. Accordingly, EEI and its members have a strong interest in the Commission's proposals to protect American consumers, including electricity customers, from unwanted and illegal robocalls, while also protecting legitimate, good-faith callers from abusive TCPA class action litigation. As public utilities, EEI members have been requested by their customers and required in many instances by their regulators to provide notifications, often by text messaging, about service

[9] *See* Comments of the U.S. Chamber Institute for Legal Reform ("Comments of the Chamber").

interruptions, status of facility repair efforts, service restoration updates and other similar information.

## III. The Commission should disregard *Marks* to interpret the definition of ATDS under the Act.

The Commission's interpretation of the statutory definition of ATDS is not restricted by *Marks*. The *Marks* decision found that the statutory definition of an ATDS is "ambiguous on its face,"[10] and therefore the Commission is free to move forward with an interpretation of the statute that differs from the Ninth Circuit's reading in *Marks*, so long as the interpretation is otherwise reasonable under *Chevron*.[11] The Ninth Circuit's decision would bind the Commission "only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[12] This means the Commission should respond to the remand issued by the D.C. Circuit in *ACA International*, which is binding precedent on all other federal circuit courts.[13] As explained above and in comments filed in the docket, the Ninth Circuit's interpretation of the statutory definition of ATDS conflicts with the other circuits that took a narrower view of an ATDS under the statute. The Commission should move forward to resolve the uncertainty around the definition of an ATDS as well as the other outstanding issues identified by EEI and other stakeholders in previous comments regarding the FCC's TCPA interpretations. To that end, EEI agrees with comments filed in the docket that explain that the *Marks* decision was incorrectly decided, with flawed reasoning that ignores other FCC interpretations of the TCPA and

[10] *Marks*, 2018 WL 449555, at *8. EEI does not agree the statute is ambiguous.

[11] If a court were to conclude the statue ambiguous, the FCC's interpretation of the language would then be entitled to judicial deference. *See Chevron v. NRDC*, 467 U.S. 837 (1984) ("*Chevron*"). *See also National Cable and Telecommunications Ass'n v. Brand X*, 545 U.S. 967 (2005) (concluding that the Ninth Circuit's conflicting construction of a statute did not restrict the FCC's discretion under *Chevron*").

[12] *See Brand X*, 545 U.S. at 982.

[13] *See* Hobbs Act, 28 U.S.C. § 2342(1) (provides that "the court of appeals has exclusive jurisdiction to enjoy, set aside, suspend (in whole or in part), or to determine the validity of . . . all final order of the Federal Communications Commission made review able by [47 U.S.C. 402(a)]").

provides little guidance on the definition of an ATDS.[14]

## IV. To be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial such numbers without human intervention. Only calls placed using actual ATDS capabilities are subject to the TCPA restrictions.

In the Public Notice, the Bureau seeks comment on how to interpret and apply the statutory definition of ATDS in Section 227(a)(1) of the Act, including the language "using a random or sequential number generator," given the recent decisions in *Marks*. The TCPA defines "automatic telephone dialing system" as "equipment which has the capacity --- (A) to store or produce telephone numbers to be called, *using a random or sequential generator*; and (B) to dial such numbers."[15] In its 2015 Declaratory Ruling and Order, the Commission determined that Congress intended a broad definition, and the use of the word "capacity" in the definition does not exempt equipment that lacks the present ability to dial randomly or sequentially. Thus, the Commission's view in 2015 was that any equipment that had the requisite "capacity" was an ATDS subject to the TCPA. The D.C. Circuit, in *ACA International*, struck down that interpretation.

The TCPA's ATDS definition is not ambiguous, but rather the plain language of Section 227(a)(1) makes it clear that equipment must store or produce telephone numbers "using a random or sequential number generator," and the FCC should confirm this reading of the statute. The Ninth Circuit ignored the statute's unambiguous plain language that indicates the clause "random and sequential number generator" applies to numbers that can be both stored or produced and instead concluded that the clause only applies to produced numbers, which conflicts with *ACA International*. In Section 227 (a)(1)(A) of the Act, the operative language is "equipment which has

[14] *See, e.g.*, Comments of the Chamber; Comments of the Credit Union National Association; American Financial Services Association and the Consumer Mortgage Coalition; Comments of Crunch San Diego; Comments of the Credit Union National Association; Comments of ACA International; Comments of Investor Business Daily, Inc.; and Comments of NCTA – The Internet & Television Association.

[15] 47 U.S.C. § 227(a)(1) (italics added).

the capacity to store or produce telephone numbers to be called, using a random or sequential number generator." In other words, "equipment which has the capacity to store or produce telephone numbers to be called" is followed by a comma and then is modified by the phrase "using a random or sequential number generator." The Ninth Circuit in *Marks* failed to apply the canon of statutory construction that "a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one where the phrase is separated from the antecedents by a comma."[16] The Commission should find that "when a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents.[17] Accordingly, the phrase "using a random or sequential number generator" is properly read as modifying both words "store" and "produce" in Section 227 (a)(1)(A) of the Act.[18]

Nevertheless, if the FCC determines the definition of ATDS is ambiguous, it is still within its reasoned decision-making authority under the TCPA to adopt the definition of an ATDS espoused by the U.S. Chamber Institute for Legal Reform, EEI, and others in the *Petition for Declaratory Ruling*. Specifically, the Commission should confirm that:

(1) to be an ATDS, equipment must use a random or sequential number generator to (a) store or produce numbers and (b) dial such numbers without human intervention; and

(2) only calls placed using actual ATDS capabilities are subject to the TCPA restrictions.

The statutory language is straightforward, and equipment that cannot perform the functions prescribed in the statute cannot meet the definition. If human intervention is required to generate a

[16] *See* Comments of Student Loan Servicing Alliance, et al., at 4 (citing to *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996, 100 (9th Cir. 2017).

[17] *See Am. Int'l Grp. Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 781 (2d Cir. 2013).

[18] *See, e.g.*, Comments of the Student Loan Servicing Alliance; Navient Corp.; Nelnet Servicing, LLC; and Pennsylvania Higher Education Assistance Agency, at 4-5.

list of numbers or to place a call, or if equipment must be modified or upgraded to add autodialing capability, the equipment does not constitute an ATDS. This interpretation would eliminate disputes over how much effort must be required for equipment to function as an ATDS.

Any other interpretation would be unreasonable. For example, electric utilities often place service-related calls manually without the use of an autodialing feature. Such calls may be made to customers who have consented to receive them, but in some cases, such as for purposes of customer satisfaction survey benchmarking, calls may be placed to individuals who are not customers and did not consent to receive them. Absent clarification, dialing a number by hand would violate the TCPA if the equipment constitutes an ATDS. If callers use a device or equipment that can be modified and used for autodialing, they face the risk of TCPA liability when placing calls manually using such a device or equipment, even if the autodialing function has not been enabled. Absent clarification, dialing a number by hand would still violate the TCPA, which leads to significant and unwarranted risk of liability for electric companies and other stakeholders.

Electric utilities and others need clear guidance when engaging in legitimate business communications. Absent an interpretation consistent with the definition proposed in the *Petition for Declaratory Ruling*, callers will continue to face a risk of TCPA liability when placing important, time-sensitive calls that their customers expect and desire manually, or when placing calls using a smartphone or equipment that, if modified by software, would be capable of autodialing, even if it is not being used in that manner. Such an interpretation does not further the purpose of the TCPA and cannot be what Congress intended in 1991 when smartphones were in their infancy and text messaging was non-existent; the intent of the TCPA is to restrict unsolicited calls and telemarketing

abuse.[19]

## V. The Commission should clarify that manually-placed calls do not use the "capability" of ATDS.

The FCC should disregard the *Marks* decision which suggests that humans manually dialing a number would be insufficient to place the equipment outside of the TCPA's requirements.[20] The Ninth Circuit concluded that a telephony system is sufficiently automated to qualify as an ATDS, where it dials number automatically even if the system must be turned on or triggered by a person.[21] The Commission should confirm that both human intervention removes equipment from the definition of ATDS and that manually-placed calls do not use the "capability" of ATDS. The Ninth Circuit has suggested an overly restrictive and unworkable standard for human intervention, and the FCC should confirm that even minimal human intervention preceding the dialing function removes the telephony device from the definition of ATDS.[22] This is contrary to Congress' intent for an ATDS to encompass database dialers that continuously dial numbers, without human intervention.[23] Again, the *Marks* decision demonstrates little guidance for the Commission and should be disregarded.

While the *ACA International* decision did not address the statutory language "make any call *using* an ATDS," the D.C. Circuit allowed the FCC to remain free to revisit the issue.[24] EEI has

[19] EEI agrees with comments that argue that the legislative intent of the TCPA points to a narrow interpretation of the TCPA. *See, e.g.*, Comments of the Chamber, at 14; Comments of the American Financial Services Association and the Consumer Mortgage Coalition, at 7; Comments of Crunch San Diego LLC, at 7.

[20] *Marks*, 2018 WL 4495553, at *9.

[21] *Id.*

[22] *See* Comments of the Consumer Union National Association, at 17-19; Comments of the Student Loan Servicing Alliance; Navient Corp.; Nelnet Servicing, LLC; and Pennsylvania Higher Education Assistance Agency, at 2-4.

[23] *See* Comments of the Insurance Coalition, at 3. (citing to 47 U.S.C. § 227 to demonstrate that by explicitly creating an exception in the preamble for calls that are consented to or are necessary in an emergency, Congress did not intend for all automated calls to be automatically captured within the TCPA).

[24] 885 F.3d at 704 (emphasis added).

urged the Commission to clarify that this language does not cover the use of ATDS, as holding the mere use of equipment that could autodial within the requirements of the TCPA could significantly impede the electric industry's ability to alert customers to the status of service outages, the presence of repair crews and other information customers themselves consider important, if not critical and time-sensitive. Under the Commission's interpretation struck down by the D.C. Circuit, electric companies would face potential TCPA liability even if they contact customers through manually-placed live calls, because every manually-placed call will have been placed from a phone that could, if reconfigured, place automated calls to wireless phones.

The purpose of the TCPA is to prevent companies from placing random, automated or prerecorded calls to cellphone users without their prior consent. That purpose is not furthered by barring companies from placing live calls manually simply because the callers use phones that, if enabled, could autodial. The Commission should instead interpret the statute to mean that prohibited autodialed calls do not include live calls placed manually, even where the caller uses equipment *capable* of autodialing. As the D.C. Circuit observed in *ACA International*, this would essentially eliminate disputes over whether it was easy or hard to utilize a telephone system's autodialing capability.[25] It is also an interpretation entirely consistent with the TCPA's consumer protection purposes.

The TCPA bars persons from making calls to wireless numbers (other than for emergency purposes or with the prior express consent of the called party) "*using* any automatic telephone dialing system."[26] The TCPA then defines as ATDS equipment with "the capacity… (A) to store or produce telephone numbers to be called, using a random or sequential generator" and (B) "to dial

[25] *See* 885 F.3d at 704.

[26] 47 U.S.C. § 227(b)(1)(A) (italics added).

such numbers."[27] The Commission should confirm that language bars only nonconsensual automated (or prerecorded) calls made from telephone systems with enabled autodialing functions, and does not bar live, manually-placed calls that *use* the same equipment when the equipment's autodialing function has not been enabled, is disabled or has not been used to place the call. In other words, the Commission should construe the term "*using* any automatic telephone dialing system," to mean *using* the automatic dialing *capability* of a telephone system, so that manually placed calls would fall outside the statute's prohibitions.

## VI. Conclusion

The Ninth Circuit's *Marks* decision should not inform the Commission's analysis. Consistent with the plain statutory text, congressional intent and the reasoning of the D.C. Circuit in *ACA International*, the Commission should confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial such numbers without human intervention; and only calls placed using actual ATDS capabilities are subject to the TCPA restrictions. The FCC should also disregard the *Marks* decision to the extent that it suggests that humans manually dialing a number would be insufficient to place the equipment outside of the TCPA's requirements. The Commission should clarify that manually-placed calls do not use the "capability" of ATDS.

Respectfully submitted,
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[27] 47 U.S.C. § 227(a)(1)(A) and (B).